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ABSTRACT

Title IX of the 1972 Education Amendments is the topic of these Department of Health, Education, and Welfare (DHEW) notices, which include both a proposed policy interpretation regarding intercollegiate athletic programs and a proposed amendment regarding federal regulation of school dress codes. The purpose of the first action is to ensure that colleges and universities understand their obligation to provide women an equal opportunity to achieve their full potential in athletic activities. The action establishes a two-part approach (immediate and long range) to compliance and enforcement which is designed to take account of the economic realities facing the nation's colleges. The purpose of the second action is to take DHEW out of the business of examining the rules imposed by local school authorities on the way students may dress or wear their hair. A statement by the Secretary of HEW on the proposed actions is also included. (DS)

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HEW NEWS

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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FOR RELEASE AT 11 A.M.
WEDNESDAY, DEC. 6, 1978

CONTACT:
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STATEMENT BY
JOSEPH A. CALIFANO, JR.
SECRETARY OF HEALTH, EDUCATION, AND WELFARE

I AM ANNOUNCING TODAY TWO ACTIONS TO FURTHER THE GOALS OF TITLE IX OF THE 1972 EDUCATION AMENDMENTS PASSED BY THE CONGRESS. TITLE IX PROVIDES:

> "NO PERSON IN THE UNITED STATES SHALL, ON THE BASIS OF SEX, BE EXCLUDED FROM PARTICIPATION IN, BE DENIED THE BENEFITS OF, OR BE SUBJECTED TO DISCRIMINATION UNDER ANY EDUCATION PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE . . . ."

THESE ACTIONS ARE IMPORTANT IN THEIR OWN RIGHT. BUT TAKEN TOGETHER THEY DEMONSTRATE SOMETHING EVEN MORE SIGNIFICANT--THE COMMITMENT OF THIS DEPARTMENT TO ENFORCE THE LAWS AGAINST DISCRIMINATION IN WAYS THAT ARE EFFECTIVE, BUT NOT EXCESSIVELY INTRUSIVE.

SP013 343

FIRST, WE ARE PUBLISHING FOR PUBLIC COMMENT A PROPOSED POLICY INTERPRETATION TO CLARIFY HOW TITLE IX AND ITS REGULATIONS APPLY TO COLLEGE ATHLETIC PROGRAMS. THE PURPOSE OF THIS ACTION IS TO ENSURE THAT OUR COLLEGES AND UNIVERSITIES UNDERSTAND THEIR OBLIGATION TO PROVIDE WOMEN AN EQUAL OPPORTUNITY TO ACHIEVE THEIR FULL POTENTIAL IN ATHLETIC ACTIVITIES.

SECOND, WE ARE TODAY ALSO PUBLISHING FOR PUBLIC COMMENT AN AMENDMENT TO THE TITLE IX REGULATION THAT WOULD TAKE HEW OUT OF THE BUSINESS OF EXAMINING THE RULES IMPOSED BY LOCAL SCHOOL AUTHORITIES ON THE WAY STUDENTS MAY DRESS OR WEAR THEIR HAIR. THE PURPOSE OF THIS ACTION IS TO KEEP THE FEDERAL GOVERNMENT OUT OF ISSUES THAT MOST AMERICANS FEEL ARE HANDLED WITH MORE COMMON SENSE AT THE LOCAL LEVEL.

IN DRAFTING OUR PROPOSED POLICY INTERPRETATION ON TITLE IX AND INTERCOLLEGIATE ATHLETICS, WE HAVE TAKEN INTO ACCOUNT A NUMBER OF CIRCUMSTANCES RELATING TO THE DEVELOPMENT AND OPERATION OF COLLEGE SPORTS FOR MEN AND WOMEN. THESE FACTS INCLUDE:

o HISTORICALLY, MOST COLLEGES AND UNIVERSITIES HAVE EMPHASIZED INTERCOLLEGIATE SPORTS FOR MEN. IN THE 1976-77 ACADEMIC YEAR 4,448,028 MEN (52.3%) AND 4,065,282 WOMEN (47.7%) ATTENDED THE NATION'S INSTITUTIONS OF HIGHER EDUCATION. AT THE SAME TIME, 395,000 STUDENTS PARTICIPATED IN INTERCOLLEGIATE ATHLETICS; OF THESE, 290,000 (74%) WERE MEN, BUT ONLY 105,000 (26%) WERE WOMEN. (ON THE AVERAGE, COLLEGES AND UNIVERSITIES PROVIDE APPROXIMATELY 10 SPORTS FOR MEN AND ONLY 6 FOR WOMEN.)

o WOMEN WHO PARTICIPATE IN INTERCOLLEGIATE ATHLETICS OFTEN DO NOT RECEIVE THEIR FAIR SHARE OF ATHLETIC RESOURCES, SERVICES AND BENEFITS. FOR EXAMPLE, DISPROPORTIONALLY MORE FINANCIAL AID HAS GENERALLY BEEN MADE AVAILABLE FOR MALE ATHLETES THAN FOR FEMALE ATHLETES.

o Despite these limitations, the number of women participating in athletics has increased sharply. During the period from 1971 to 1976, the enrollment of women in the nation's institutions of higher education rose from 3,742,000 to 5,201,000, an increase of 39%. During this same period, the number of women participating in intramural sports increased from 276,167 to 576,648, an increase of more than 100%. In intercollegiate sports, women's participation increased from 31,852 to 64.375, again an increase of more than 100%. These figures dramatize two points: the growing interest of women in athletics and the efforts of colleges and universities to respond to that interest.

The proposed policy interpretation we are issuing today is aimed at clarifying, for the colleges and universities that must comply with Title IX, what they must do with their athletic programs in order to obey the law.

In writing this interpretation, we have been guided by what the Congress said--and some important things that it has refused to say.

In 1974, an attempt was made in the Congress to eliminate revenue-producing sports from the coverage of Title IX. This effort failed.

After President Ford issued the Title IX regulation in 1975, several attempts were made to eliminate or circumscribe its application to revenue-producing sports. All these attempts failed.

But in 1974, the Congress did provide specific guidance for future Secretaries of HEW who would have to enforce this law. It stated, in the Education Amendments of that year, that regulations implementing Title IX should "include with respect to intercollegiate athletic activities reasonable provisions considering the nature of the particular sports."

THIS IS WHAT WE HAVE TRIED TO DO IN THE PROPOSED POLICY INTERPRETATION. THE INTERPRETATION RECOGNIZES THAT INTERCOLLEGIATE FOOTBALL, IN PARTICULAR, IS UNIQUE AMONG SPORTS, AT SOME INSTITUTIONS, BECAUSE OF THE SIZE OF ITS TEAMS, THE SUPPORT STAFFS AND FACILITIES IT REQUIRES, AND THE VOLUME OF REVENUE IT GENERATES.

THE DEPARTMENT'S PROPOSED POLICY INTERPRETATION ESTABLISHES A TWO PART APPROACH TO COMPLIANCE AND ENFORCEMENT, WHICH IS DESIGNED TO TAKE ACCOUNT OF THE ECONOMIC REALITIES FACING OUR NATION'S COLLEGES.

THE FIRST PART IS AIMED AT IMMEDIATELY ELIMINATING DISCRIMINATION IN UNIVERSITY ATHLETIC PROGRAMS, TAKING THESE PROGRAMS AS THEY ARE TODAY. IT REQUIRES THAT EXPENDITURES ON MEN'S AND WOMEN'S ATHLETICS BE PROPORTIONAL TO THE NUMBER OF MEN AND WOMEN PARTICIPATING IN ATHLETICS. THIS STANDARD OF "SUBSTANTIALLY EQUAL PER CAPITA EXPENDITURES" MUST BE MET UNLESS THE INSTITUTION CAN DEMONSTRATE THAT THE DIFFERENCES ARE BASED ON NON-DISCRIMINATORY FACTORS, SUCH AS THE COSTS OF A PARTICULAR SPORT (FOR EXAMPLE, THE EQUIPMENT REQUIRED), OR THE SCOPE

OF COMPETITION (THAT IS, NATIONAL RATHER THAN REGIONAL OR LOCAL). THIS PROPORTIONAL STANDARD APPLIES TO ATHLETIC SCHOLARSHIPS, RECRUITMENT, AND OTHER READILY MEASURABLE FINANCIAL BENEFITS SUCH AS EQUIPMENT AND SUPPLIES, TRAVEL, AND PUBLICITY. FOR THOSE BENEFITS AND SERVICES THAT ARE NOT READILY FINANCIALLY MEASURABLE--OPPORTUNITY TO COMPETE AND PRACTICE, OPPORTUNITY TO RECEIVE COACHING AND ACADEMIC TUTORING, PROVISION OF LOCKER ROOMS, MEDICAL SERVICES AND HOUSING FACILITIES--COMPARABILITY IS REQUIRED.

PART TWO OF THE PROPOSED POLICY IS DESIGNED TO ELIMINATE OVER A REASONABLE PERIOD OF TIME, THE DISCRIMINATORY EFFECTS OF THE HISTORIC EMPHASIS ON MEN'S SPORTS, AND TO FACILITATE THE CONTINUED GROWTH OF WOMEN'S ATHLETICS. IT REQUIRES COLLEGES AND UNIVERSITIES TO TAKE SPECIFIC, ACTIVE STEPS TO PROVIDE ADDITIONAL ATHLETIC OPPORTUNITIES FOR WOMEN--OPPORTUNITIES THAT WILL FULLY ACCOMMODATE THE RISING INTERESTS OF WOMEN IN PARTICIPATING IN ATHLETICS.

AMONG THE PROCEDURES TO BE USED ARE INCREASING THE NUMBER OF SPORTS OFFERED FOR WOMEN, AT THE INTRAMURAL, CLUB AND INTERCOLLEGIATE LEVELS OF COMPETITION, AND ENLARGING THE SCOPE OF COMPETITION. INSTITUTIONS OF HIGHER EDUCATION WILL REMAIN FREE, HOWEVER, TO ACCOMMODATE THE INCREASED ATHLETIC INTERESTS AND ABILITIES OF WOMEN IN OTHER WAYS. AND IN OUR ENFORCEMENT EFFORTS, WE WILL LOOK WITH FAVOR ON INNOVATIVE APPROACHES.

THIS INTERPRETATION IS THE RESULT OF MONTHS OF WORK AND CONSIDERABLE CONSULTATION WITH WOMEN'S GROUPS, THE HIGHER EDUCATION COMMUNITY, AND COLLEGE ATHLETIC DEPARTMENTS. + Women's Athletic Groups

I AM TODAY SENDING A COPY OF THIS POLICY TO AN EVEN LARGER GROUP OF UNIVERSITY PRESIDENTS, ATHLETIC ASSOCIATIONS AND WOMEN'S ORGANIZATIONS. WE SEEK THE WIDEST POSSIBLE COMMENT ON THIS PROPOSED INTERPRETATION BECAUSE WOMEN'S ATHLETIC PROGRAMS ARE ONE OF THE MOST SIGNIFICANT AREAS OF DISCRIMINATION IN HIGHER EDUCATION.

AS OF LAST WEEK, WE HAD RECEIVED COMPLAINTS ALLEGING SEX DISCRIMINATION IN THE ATHLETIC PROGRAMS OF 62 UNIVERSITIES. WITH THE BENEFIT OF COMMENTS WE EXPECT TO RECEIVE FROM ALL INTERESTED INDIVIDUALS AND GROUPS, I AM CONFIDENT WE WILL END UP WITH A POLICY THAT IS BOTH PRACTICAL AND CONSISTENT WITH THE LAW.

ONCE A FINAL INTERPRETATION IS ISSUED, WE INTEND TO ENFORCE IT.

AT THE SAME THAT WE ARE TAKING THIS MAJOR STEP IN THE AREA OF COLLEGIATE ATHLETICS, I AM ALSO ANNOUNCING AN EFFORT TO REDUCE UNNECESSARY AND INAPPROPRIATE FEDERAL INTRUSION IN ELEMENTARY AND SECONDARY SCHOOLS. I AM TODAY SENDING TO THE FEDERAL REGISTER A PROPOSAL TO DELETE ONE ITEM IN THE TITLE IX REGULATION--THE ITEM THAT DEALS WITH "RULES OF APPEARANCE" SET BY SCHOOL OFFICIALS. THIS PROVISION IN THE EXISTING TITLE IX REGULATION PROHIBITS SCHOOLS FROM ADOPTING AND ENFORCING DISCRIMINATORY CODES OF APPEARANCE, INCLUDING HAIR LENGTH AND DRESS CODES, FOR BOYS AND GIRLS.

I BELIEVE DECISIONS REGARDING THE WAY STUDENTS MAY DRESS OR WEAR THEIR HAIR ARE BEST MADE AT THE LOCAL LEVEL, AND NOT BY THE FEDERAL GOVERNMENT. I AM, THEREFORE, PROPOSING THAT THE DEPARTMENT ELIMINATE THIS PROVISION TO PREVENT SUCH INTRUSIONS.

WE WILL REVIEW ALL WRITTEN COMMENTS ON THIS PROPOSAL AND MODIFY IT IF NECESSARY BEFORE SUBMISSION TO PRESIDENT CARTER AND BOTH HOUSES OF CONGRESS.

IN TAKING THESE TWO ACTIONS, THE DEPARTMENT HAS IMPROVED THE ENFORCEMENT OF TITLE IX. GOVERNMENT MUST CONCENTRATE ITS RESOURCES ON MATTERS OF GREATEST IMPORTANCE. ISSUES THAT PROFOUNDLY AFFECT THE WELL-BEING AND PERSONAL DEVELOPMENT OF OUR YOUNG PEOPLE DESERVE--AND REQUIRE--OUR ATTENTION.

ANYONE WHO DOUBTS THE IMPORTANCE OF EQUAL ATHLETIC OPPORTUNITY FOR WOMEN NEED ONLY REMEMBER THOSE THINGS THAT WE HAVE ALL HEARD THROUGHOUT OUR LIVES ABOUT PARTICIPATION IN SPORTS: THAT ATHLETICS TEACH BOTH TEAMWORK AND LEADERSHIP; THAT ATHLETICS CREATE PRIDE IN ACCOMPLISHMENT; THAT ATHLETICS TEACH SPORTSMANSHIP--HOW TO WIN AND HOW TO LOSE; THAT COMPETITIVE SPORTS BUILD CHARACTER.

DOES ANYONE THINK FOR A MOMENT THAT THOSE BENEFITS APPLY ONLY TO MEN?

# # #

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

[45 CFR Part 86]

NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

AGENCY : Office of the Secretary, HEW

ACTION : Notice of Proposed Rule Making

SUMMARY : The Department of Health, Education, and Welfare proposes to revoke a subparagraph of its Title IX Regulation which lists codes of personal appearance as an example of sex discrimination in education over which the Department takes jurisdiction.

DATES : Comments must be received on or before February 20, 1979. Send your comments to:

David S. Tatel, Director
Office for Civil Rights
330 Independence Avenue, S. W.
Room 5027
Washington, D. C. 20201

FOR FURTHER INFORMATION CONTACT:

Colleen O'Connor
202-245-6700

SUPPLEMENTARY INFORMATION:

The purpose of the proposed revocation is to remove local rules relating to personal appearance from Departmental review under Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et. seq.). The legislative history of Title IX gives no indication that the Congress intended the Executive Branch to regulate in the area of personal appearance. Issues of sex discrimination pertaining to hair length and other aspects of appearance are properly resolved at the local level. Moreover, by deleting the subparagraph concerning codes of appearance, the Department can more effectively use its resources for enforcing other parts of the current regulation, thus fulfilling more completely the intent of the Congress in enacting Title IX.

The deletion of this subparagraph is not intended to alter the Department's authority to prohibit codes of appearance that discriminate against individuals in Federally funded programs on the basis of national origin or race under Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, et. seq.).

Paragraph (b) of 45 CFR 86.31 currently reads as follows:

(b) Specific prohibitions. Except as provided in this subpart, in providing any aid, benefit,

or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment.

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(7) Aid or perpetuate discrimination against any person by providing signficant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

The proposed deletion of subparagraph (b)(5) would leave the remainder of the paragraph unchanged, except for a renumbering of subparagraphs (6), (7), and (8).

Any regulation adopted under Title IX of the Education Amendments of 1972 must be approved by the President.

Under the requirements of the General Education Provisions Act, any regulation adopted under Title IX must also be submitted to the Speaker of the House of Representatives and the President of the Senate before becoming effective.

The deletion of 45 CFR 86.31(b)(5) is proposed under the authority of Section 901, 902, Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93-568, 88 Stat. 1855, Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484, and Sec. 440b of the General Education Provision Act, 20 U.S.C. 1232i.

Accordingly, the Department of Health, Education and Welfare proposes to amend 45 CFR 86.31(b) by deleting paragraph (5) and re-numbering paragraphs (6), (7), and (8) as (5), (6), and (7) respectively.

DATED: December 6, 1978

Secretary of Health, Education, and Welfare

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
Office for Civil Rights
Office of the Secretary
TITLE IX OF THE EDUCATION AMENDMENTS OF 1972
A Proposed Policy Interpretation

SUBJECT: Title IX and Intercollegiate Athletics

NOTICE: The following proposed Policy Interpretation applies the provisions of Title IX of the Education Amendments of 1972 and its implementing regulation to intercollegiate athletics. It is being published in proposed form for public comment.

In developing this policy interpretation, a broad range of alternatives and views were considered. For example, some urged adoption of policies requiring immediate equality of expenditures on men's and women's sports based on enrollment. Others urged that receipts generated by revenue-producing sports be exempt from Title IX.

The proposed Policy Interpretation attempts to accommodate many of the concerns expressed, consistent with the Department's obligations under the law passed by the Congress. The policy bases compliance on participation rates, not enrollment, but requires that procedures be established to increase opportunities for women to participate in competitive athletics. The policy also bases

compliance on a calculation that includes all revenue, regardless of source, but recognizes that certain sports that produce revenue, such as football and basketball, may require greater expenditures without having a discriminatory effect. The Policy Interpretation recognizes the higher costs of sports involving large teams, large coaching staffs, expensive equipment and facilities, and additional costs of travel, recruiting, publicity, and the like, associated with national competition.

The Department is seeking public comment on this approach as well as on all other aspects of the proposed Preamble and Policy Interpretation. In particular:

1. Is the description of the current status and development of intercollegiate athletics for men and women accurate? What other factors should be considered?

2. Is the proposed two stage approach to compliance practical? Should it be modified? Are there other approaches that should be considered?

3. Is the equal average per capita standard based on participation rates practical? Are there alternatives or modifications that should be considered?

4. Is there a basis for treating part of the expenses of a particular revenue producing sport differently because the sport produces income used by the university for non-athletic operating expenses on a non-discriminatory basis? If so, how should such funds be identified and treated?

5. Is the grouping of financially measurable benefits into three categories practical? Are there alternatives that should be considered? Specifically, should recruiting expenses be considered together with all other financially measurable benefits?

6. Are the factors used to justify differences in equal average per capita expenditures for financially measurable benefits and opportunities fair? Are there other factors that should be considered?

7. Is the comparability standard for benefits and opportunities that are not financially measurable fair and realistic? Should other factors controlling comparability be included? Should the comparability standard be revised? Is there a different standard that should be considered?

8. Is the proposal for increasing the opportunity for women to participate in competitive athletics appropriate and effective? Are there other procedures that should be considered? Is there a more effective way to ensure that the interests and abilities of both men and women are equally accommodated?

To the extent comments relate to the financial impact of the proposed Policy Interpretation or any alternatives suggested, please supply detailed supporting financial information and worksheets. Also, please supply legal analyses to support alternative suggestions and approaches.

Comments should be submitted in writing by February 10, 1979 to:

Director
Office for Civil Rights
U.S. Department of Health, Education and Welfare
330 Independence Avenue, S. W.
Washington, D.C. 20201

All comments will be fully considered in the preparation of a final Preamble and Policy Interpretation.

PREAMBLE

Section 901(a) of Title IX of the Education Amendments of 1972 provides:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...."

Section 844 of the Education Amendments of 1974 further provides:

> The Secretary (of HEW) shall prepare and publish...proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in Federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of the particular sports." (Emphasis added.)

Section 844 was passed by Congress after the Conference Committee deleted an amendment adopted on the floor of the Senate that would have exempted revenue producing athletics from the application of Title IX. 1/

The regulation issued by the Department pursuant to Title IX was signed by President Ford on May 27, 1975, and submitted to the Congress pursuant to Section 431(d)(1) of the General Education Provisions Act.

1/ See Cong. Rec. S.8488 (daily ed. May 20, 1974).

Hearings were held in the House Sub-Committee on Post-Secondary Education on a resolution disapproving the regulation. 2/ The Congress did not disapprove the regulation within 45 days and it therefore became effective on July 21, 1975. Subsequently, hearings were held in the Senate Sub-Committee on Education on a bill to exclude revenues produced by certain sports to the extent they are used to pay the cost of those sports. 3/ The Committee, however, took no further action on this bill.

The regulation requires that recipients who operate or sponsor interscholastic, intercollegiate, club or intramural athletics, provide equal athletic opportunities for members of both sexes. [45 CFR § 86.41(c)] In determining whether an institution is providing equal opportunity in intercollegiate athletics, the regulation requires the Department to consider, among others, the following factors:

> (i) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
>
> (ii) the provision of equipment and supplies;
>
> (iii) scheduling of games and practice time;

2/ The Hearings were held on H. Con. Res. 310 disapproving the entire Title IX Regulation, and H. Con. Res. 311, disapproving the regulation's provision on intercollegiate athletics.

3/ The Hearings were held on September 16 and 18, 1975 on S.2106 co-sponsored by Senators Tower, Bartlett and Hruska.

(iv) travel and per diem allowance;

(v) opportunity to receive coaching and academic tutoring;

(vi) assignment and compensation of coaches and tutors;

(vii) provision of locker rooms, practice and competitive facilities;

(viii) provision of medical and training facilities and services;

(ix) provision of housing and dining facilities and services; and

(x) publicity."

[45 CFR § 86.41(c)]

The regulation states that recipients will not be in violation of Title IX if they provide unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams. However, it authorizes the Department to consider the adequacy of the funds provided for teams for one sex in assessing equality of opportunity. [45 CFR § 86.41(c)]

The regulation specifically requires equal opportunity in scholarship assistance: "[T]o the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics." [45 CFR § 86.37(c)] The regulation also provides that "A recipient ... shall not discriminate on the basis of sex in the recruitment...of students." [45 CFR § 86.23]

Finally, the regulation established a three year transition period to give institutions time to comply. [45 CFR § 86.41 (d)] That transition period expired on July 21, 1978.

By November 1978, the Department had received 93 complaints alleging that more than 62 institutions of higher education were not providing equal athletic opportunities for women. This policy interpretation is designed to provide a framework within which those complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements of the law relating to intercollegiate athletic programs. 4/

4/ This Policy Interpretation supersedes all earlier Departmental positions on the same subject. Specifically, on issues directly addressed in this Policy Interpretation, it supersedes the "Sports Memorandum" (Memorandum to Chief State School Officers, from Director, Office for Civil Rights, September 1975). This Policy Interpretation will be followed by additional interpretations relating to coaches salaries, contact sports, and other issues that may relate to intercollegiate athletics.

This Policy Interpretation also applies to club and intramural sports where appropriate and practicable. In particular it applies with respect to the comparability of benefits, services, and facilities.

In drafting this Policy Interpretation, the Department has taken account of the following circumstances concerning the development and operation of intercollegiate sports for men and women:

1. Historically, most colleges and universities have emphasized intercollegiate sports for men. Partially as a consequence of this, participation rates of women in intercollegiate sports are far below those of men. In the 1976-77 academic year 4,448,028 men (52.3%) and 4,065,282 women (47.7%) attended the nation's institutions of higher education. 5/

5/ Racial, Ethnic and Sex Enrollment Data from Institutions of Higher Education, Fall 1976, Office for Civil Rights, U. S. Department of Health, Education and Welfare, (1978) at 221.

At the same time, 395,000 students participated in intercollegiate athletics; of these, 290,000 (74%) were men, but only 105,000 (26%) were women. 6/ The historic emphasis on men's intercollegiate athletic programs has also contributed to existing differences in the number of sports and scope of competition offered men and women. On the average, colleges and universities provide approximately 10 sports for men and only six for women. 7/

2. Those women who participate in intercollegiate athletics often do not receive their fair share of athletic resources, services and benefits. For example, disproportionally more financial aid has been made available for male athletes than for female athletes. Presently, in institutions that

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6/ These figures are approximations based on limited data from the Association for Intercollegiate Athletics for Women (AIAW) which in turn were based on participation data from the National Collegiate Athletics Association (NCAA), the National Association of Intercollegiate Athletics (NAIA), and the National Junior College Athletic Association (NJCAA).

7/ Median for the 722 NCAA member institutions during the 1976-77 academic year, based on limited data from the NCAA. A typical pattern of offerings might be: for men — football, basketball, baseball, wrestling, golf, tennis, swimming, indoor, outdoor, and cross-country track; and for women — basketball, volleyball, golf, tennis, swimming and field hockey.

are members of both NCAA and AIAW, the average annual scholarship budget is $39,000. Male athletes receive $32,000 or 82% of this amount while female athletes receive only $7,000, or 17.9% of the total, 8/ although women constitute 26% of all those participating in intercollegiate athletics. Likewise, substantial amounts have been provided for the recruitment of male athletes, but until 1977 few, if any, funds were made available for recruitment of female athletes. Congressional testimony on Title IX and subsequent surveys indicate that discrepancies also exist in the ratio of coaches to athletes, and in other benefits and opportunities, such as quality and amount of equipment, access to facilities and practice times, publicity, medical and training facilities, and housing and dining facilities. 9/

8/ Figures obtained from AIAW Structure Implementation Survey Data Summary, October 1978.

9/ 121 Cong. Rec. 29791-95 (1975) (remarks of Senator Williams); Comments by Senator Bayh, Hearings on S. 2106 Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare, 94th Cong., 1st Sess. 48 (1975); "Survey of Women's Athletic Directors," AIAW Workshop, (Jan. 1978).

3. Despite these limitations, the number of females participating in athletics has increased dramatically. During the period from Fall 1971 to Fall 1977, the enrollment of females in high school decreased from approximately 7,600,000 to approximately 7,150,000, a decrease of over 5%. 10/ During the period from 1970 to 1978 the number of female participants in organized high school sports increased from 294,000 to 2,083,000 -- an increase of over 600%. 11/

10/ Digest of Education Statistics 1977-78, National Center for Education Statistics (1978), Table 40, at 44. Data, by sex, are unavailable for the period from 1971 to 1977; consequently, these figures represent fifty percent of total enrollment for that period.

11 / Figures obtained from National Federation of State High School Associations (NFSHSA) data. This is the best comparison that could be made based on available data.

This growth has been reflected on the campuses of the nation's colleges and universities. During the period from 1971 to 1976, the enrollment of women in the nation's institutions of higher education rose from 3,742,000 to 5,201,000, an increase of 39%. 12/ During this same period, the number of women participating in intramural sports increased from 276,167 to 576,648, an increase of more than 100%. In club sports, the number of women participants increased from 16,386 to 25,541, or 56%. In intercollegiate sports, women's participation increased from 31,852 to 64,375, or 100%. 13/ These developments reflect the growing interest of women in competitive athletics, as well as the efforts of colleges and universities to respond to those interests.

12/ Digest of Education Statistics 1977-78, National Center for Education Statistics (1978), Table 82, at 83.

13/ These figures, which are not precisely comparable to those cited at footnote 6, were obtained from Sports and Recreational Programs of the Nation's Universities and Colleges, NCAA Report #5, March 1978. It includes figures only from the 722 NCAA member institutions because comparable 1971 data was not available from other associations.

4. Equalizing opportunity for men and women in athletics will not result in identical men's and women's athletic programs. Intercollegiate athletic programs that provide equal opportunities for both sexes may offer different sports, and have different participation rates and varying competition opportunities for men and for women, because their interests and abilities may be different. These differences will result in different men's and women's programs that do not violate Title IX.

5. At several institutions, intercollegiate football is unique among sports. The size of the teams, the expense of the operation, and the revenue produced distinguish football from other sports, both men's and women's. At other institutions, basketball has special significance. Title IX requires that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulations in the administration of any revenue producing intercollegiate athletic activity." 14/ However, the unique size and cost of football programs have been taken into account in developing this policy interpretation.

14/ See April 18, 1978, Opinion of General Counsel, Department of Health, Education and Welfare, p.1., attached hereto as Appendix A.

* * *

This policy interpretation establishes a two stage approach to compliance and enforcement:

- Part I is designed to eliminate discrimination against men or women currently participating in intercollegiate programs. It requires the immediate elimination of discrepancies in average per capita expenditures for financially measurable benefits and opportunities unless the institution can demonstrate that the discrepancies are based on differences in the costs of particular sports (e.g., equipment), their scope of competition (e.g., national, regional or local), or other non-discriminatory factors. Part I also requires comparability with respect to those benefits and services that are not readily financially measurable.

- Part II is designed to eliminate, over a reasonable period of time, the discriminatory effects of the historic emphasis on men's intercollegiate sports, and to facilitate the continued growth of women's athletics. It requires adoption of procedures for the expansion of women's athletic programs to provide the number of participation opportunities needed to accommodate the interests and abilities of women.

Together, Parts I and II are designed to ensure that intercollegiate athletic programs at colleges and universities provide equal opportunities for both sexes. They are designed to ensure that women's intercollegiate athletic programs receive the resources and commitments to which they are entitled. This will not necessarily result in identical men's and women's intercollegiate athletic programs. Finally, Parts I and II take account of the size and cost of football by measuring present compliance in terms of actual, rather than potential, participation rates; by recognizing the fact that the costs of some sports are greater than others; and where appropriate, by taking account of the scope of competition.

In developing this Policy Interpretation, the Department has been sensitive to the economic conditions of higher education. The Department is aware that financial resources available for higher education in general, and for intercollegiate sports in particular, are not unlimited. The two stage approach was primarily adopted for these reasons. This approach ensures the provision of equal athletic opportunities while taking into account the very real financial problems facing institutions of higher education. Thus, while Part I may require immediate increases in funds available for some women's athletic programs, funds to comply with Part II can be developed over a longer period of time. In both cases, financial resources, to the extent needed, can be made avail-

able through any one or more of the following: the development of increased resources from university budgets, gate receipts, student fees, donations, gifts, etc., or, the redistribution of existing athletic resources.

One additional principle has guided development of this Policy Interpretation: the desire to allow for maximum institutional flexibility and minimal Federal intrusion into the operation of intercollegiate athletic programs. For this reason, the policy measures compliance in overall terms, and allows flexibility in the distribution of athletic resources to individual participants of each sex. It also presumes compliance with respect to a group of financially measurable benefits, if an institution can show compliance with respect to the group as a whole. It provides for significant institutional flexibility in the development of techniques for accommodating the interests and abilities of students.

This Policy Interpretation focuses on the provision of equal athletic opportunity for women because, in most cases, women's athletic opportunities have been limited. However, Title IX prohibits discrimination against both men and women. Accordingly, this Policy Interpretation is equally applicable where men's athletic opportunities have been previously limited.

PROPOSED POLICY INTERPRETATION

A college or university intercollegiate athletic program will be in compliance with Title IX if:

I. It has eliminated discrimination in financial support and other benefits and opportunities in its existing athletic program; and

II. It follows an institutional policy that includes procedures and standards for developing an athletic program that provides equal opportunities for men and women to accommodate their interests and abilities.

I. Eliminating Discrimination in Existing Programs

To determine whether a college or university has eliminated discrimination on the basis of sex in its existing athletic program, benefits and opportunities that are readily financially measurable and those that are not will be examined separately. An institution provides equal athletic opportunities in its existing program if:

A. Substantially equal average per capita funds are allocated to participating male and female athletes for:

1. financial assistance awarded on the basis of athletic ability;
2. recruitment; and
3. all other readily financially measurable benefits and opportunities;

provided however, that differences in average per capita expenditures for such financially measurable benefits and opportunities will be considered consistent with Title IX if the institution can demonstrate that the differences result from non-discriminatory factors such as the nature or level of competition of a particular sport.

B. Comparable benefits and opportunities which are not readily financially measurable, are provided for participating male and female athletes.

A. Financially Measurable Benefits and Opportunities

Equality of benefits and opportunities for men and women in many aspects of a recipient's intercollegiate athletic program can best be measured in financial terms. Financially measurable benefits and opportunities covered by the Title IX regulation [45 CFR § 86.41(c)] include but are not limited to:

1. financial assistance awarded on the basis of athletic ability;

2. recruitment of athletes;

3. provision and maintenance of equipment and supplies;

4. living and travel expenses related to competitive events; and

5. publicity.

In assessing whether an institution's present intercollegiate athletic program complies with Title IX, the Department will initially determine whether the institution's average per capita expenditures for male and female athletes on financially measurable benefits and opportunities are substantially equal. Average per capita expenditures will be calculated by dividing total expenditures on financially measurable benefits for each sex by the total number of participating athletes of each sex.

All funds spent on benefits or opportunities for athletes of each sex, regardless of source (gate receipts, student fees, earmarked donations, booster club funds, etc.), will be considered in computing the total expenditures for athletes of that sex. Funds that are generated by athletic events but allocated to non-athletic activities (e.g., general institutional operating expenses, libraries) will not be included.

An institution may measure the number of participants in intercollegiate athletics by any non-discriminatory method. For example, institutions can use certified eligibility lists developed in accordance with NCAA or AIAW standards that are non-discriminatory.

In evaluating per capita expenditures for financially measurable benefits and opportunities, the Department will examine expenditures for athletic financial assistance and recruitment individually and will examine all other financially measurable items -- equipment and supplies, travel and per diem, publicity, etc. -- as a group. If the average per capita expenditures for participating males and females are substantially equal for the group of all other financially measurable items, the institution will be presumed to be in compliance as to each of the separate items that constitute the group.

If average per capita expenditures are not substantially equal, the Department will examine the reasons advanced by the institution as justification for the differences. Variations in average per capita expenditures may be caused by differences in costs, levels of competition, and other non-discriminatory factors. Some of the reasons that the Department may accept for variations from the equal average per capita standard are set out below.

1. Financial Assistance

Greater per capita expenditures for athletic financial assistance in either men's or women's programs will be consistent with Title IX if they result from non-discriminatory circumstances or decisions. For example, an athletic director may decide not to award the usual number of scholarships in a particular year because he/she believes that some should be deferred until a later year for purposes of program development. This is a programmatic decision concerning the building of a team or total program which may result in different expenditures that do not violate Title IX. Also, the necessary extra cost of tuition for some out-of-state athletes of either sex may cause greater average per capita expenditures that are not discriminatory.

2. Recruiting

Similarly, greater per capita expenditures for recruiting in either men's or women's programs will be consistent with Title IX if they result from non-discriminatory programmatic decisions. For example, where the current area of intercollegiate competition is regional rather than national, less expensive regional recruitment may currently be appropriate. Likewise, greater competition for a particular athlete may make it necessary for an institution to approach that athlete more often, thereby increasing the cost of recruitment for athletes of that sex. Although identical recruitment methods or techniques are not required, the level of effort and methods used to recruit must be based on non-discriminatory criteria.

3. Other Financially Measurable Benefits and Opportunities

In the case of other readily financially measurable benefits and opportunities, per capita expenditures for men and women may differ simply because of intrinsic sex-neutral differences in the particular men's and women's sports sponsored by the recipient. Variations in average per capita expenditures are non-discriminatory if they result from:

a. Differences controlled by the nature of the sport, such as variations in the cost of equipment and supplies; and/or

b. Differences resulting from the scope of competition (e.g., local, regional, or national), such as cost of travel to distant locations for competition, living expenses while in those locations, more extensive publicity, or the cost of other activities that may vary in accordance with the requirements of local, regional or national competition.

Differences in per capita expenditures that result in discrimination cannot be excused by different rules of men's and women's athletic associations. The Title IX regulation specifically states:

> The obligation to comply is not obviated or alleviated by any rule or regulation of any...athletic or other league, or association.... [45 CFR § 86.6(c)]

B. Benefits and Opportunities That Are Not Financially Measurable

Equality of opportunity in aspects of an intercollegiate athletic program that cannot readily be measured in financial terms will be determined by assessing whether the program offers comparable benefits and opportunities for men and women. Such non-financially measurable benefits and opportunities covered by the Title IX regulation [45 CFR §86.41(c)] include, but are not limited to:

1. opportunity to compete and practice;
2. opportunity to receive coaching and academic tutoring;
3. provision of locker rooms, practice and competitive facilities;
4. provision of medical and training services and facilities; and
5. provision of housing and dining services and facilities.

1. Opportunity to Compete and Practice

Comparability of opportunity to compete and practice will be determined by examining the institution's scheduling of games and practice times. Opportunities will be comparable if:

a. Decisions regarding scheduling are based on non-discriminatory criteria;

b. Facilities provided for games and practice are made available at times that are convenient for participants of each sex; and

c. Game schedules are arranged so that each sex has an equal opportunity to compete before an audience.

2. Opportunity to Receive Coaching and Academic Tutoring

The Department will presume that comparable opportunity to receive coaching exists where the ratio of full-time coaches (or their equivalent) to participating athletes is substantially equal for males and females. Discrepancies in the ratio will be accepted if they are the result of non-discriminatory factors required by the nature of a particular sport. Title IX does not require that particular men's and women's teams have an equal number of coaches. If tutoring services are provided, tutors must be made available to student athletes on the basis of non-discriminatory criteria.

3. Facilities

The elements to be considered in determining comparability of facilities include:

a. Access to those facilities by student athletes; and

b. Suitability to the sports to be played (e.g., size, safety, maintenance, spectator and media capacity).

Comparable facilities can be offered by providing separate comparable facilities or sharing the same facilities. For example, if an institution has spacious well-equipped facilities for men but not for women, it has one of two choices. It may expand the women's facilities to a comparable standard or may meet its obligation to provide comparable facilities by making the same facilities available to both men and women at different times on an equitable basis. The latter could be accomplished either by rotating the use of the entire facility or by alternating use of the previously separate men's and women's facilities. The regulation does not require identical facilities.

4. Provision of Medical and Training Services and Facilities

If an institution supplies doctors, trainers, physical therapists, or other health and training personnel and facilities to athletes, they must be made available on a non-discriminatory basis. For example: the pattern of injuries and thus the cost of insurance may vary from sport to sport. An institution may offer different athletic insurance policies tailored to injuries occuring in a particular sport. But the policies must provide similar benefits for similar injuries.

5. Provision of Housing and Dining Services and Facilities

Housing and dining services and facilities provided to athletes need not be identical, but must be comparable. An institution may provide a separate dormitory for male athletes but not for female athletes so long as there are no additional services or benefits that accrue to residents of the separate dormitory. However, differences in housing, dining, and related services and facilities will be accepted if they are made available on a non-discriminatory basis.

II. Equally Accommodating the Interests and Abilities of Women

The Title IX regulation does not require an equal number of men and women participants or an equal number of men's and women's sports. Rather, it requires that the interests and abilities of men and women be equally accommodated. In recent years, there has been a significant growth in the athletic interests and abilities of women.

An institution that satisfies Part I of this Policy Interpretation will be considered in compliance with Title IX if in addition it follows an institutional policy that ensures that the interests and abilities of women are effectively accommodated in its intercollegiate program. Specifically, such a policy must include procedures and standards:

A. To encourage an increase in the number of women participants at the club, intramural and intercollegiate level;

B. To increase the number of women's sports at the club, intramural and intercollegiate level;

C. To publicize on campus and at feeder schools athletic opportunities for women at the institution; and

D. To elevate the scope of women's intercollegiate competition (e.g., from local to state, state to regional, and from regional to national).

An institution that does not choose to have the above procedures may, nevertheless, be satisfying the athletic interests and abilities of its female students. Such an institution should be able to demonstrate that it is doing so, for example:

A. By showing that the club, intramural, and intercollegiate sports currently offered accommodate the interests and abilities of women by providing opportunities comparable to those of men at all levels (i.e., intramural, club and intercollegiate);

B. By showing that there is at the institution a pattern of increased participation by women in athletic activities at all levels; or

C. By showing that the institution's overall athletic program at all levels reflects the growth in the athletic interests and abilities of women evidenced in regional or area interscholastic programs.

AUTHORITY: Section 901(a) of the Education Amendments of 1972, 20 U.S.C. 1681 et seq.

Section 901(a)

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....

Section 844 of the Education Amendments of 1974, Pub. L. 93-380 Title VIII, (Aug. 21, 1974) 88 Stat. 612.

Section 844

> The Secretary shall prepare and publish, not later than 30 days after the date of enactment of this Act, proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Regulation issued under Title IX of the Education Amendments of 1972, 45 C.F.R. §§ 86.23(a), 86.37(c), and 86.41.

Section 86.23(a)

> (a) Nondiscriminatory recruitment. A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 86.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.3(b)

Section 86.37(c)

(c) Athletic scholarships. (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 86.41 of this part.

Section 86.41

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) Equal Opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services;

(x) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not consitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) Adjustment period. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

COVERAGE: This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This coverage includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 86.2 of the Title IX regulation.

DATED: December 6, 1978

David S. Tatel
Director, Office for Civil Rights
Department of Health, Education
and Welfare

DATED: December 6, 1978

Joseph A. Califano, Jr.
Secretary, Department of Health
Education and Welfare

Appendix A

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
THE OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

THE GENERAL COUNSEL

APR 18 1978

MEMORANDUM

TO : The Secretary

FROM : F. Peter Libassi

SUBJECT: Applicability of Title IX of the Education Amendments of 1972 to Revenue Producing Intercollegiate Athletics

Issue

You have asked our opinion as to whether an institution of higher education which is receiving Federal financial assistance must comply with the prohibition against sex discrimination imposed by Title IX of the Education Amendments of 1972 and the regulations promulgated thereunder (45 C.F.R. Part 86) in the administration of its revenue producing intercollegiate athletic activities.

Conclusion

Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) prohibits sex discrimination in any "education program or activity" receiving Federal financial assistance. In our opinion, a revenue producing intercollegiate athletic program is (a) an education program or activity within the meaning of Title IX, and (b) an integral part of the general undergraduate education program of an institution of higher education. Accordingly, in our opinion, an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulations in the administration of any revenue producing intercollegiate athletic activity if either the athletic activity or the general education program of which the athletic activity is a part is receiving Federal financial assistance.

Discussion

Section 901(a) of Title IX of the Education Amendments of 1972 provides as follows:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...."

There is no reference anywhere in Title IX to revenue producing athletics, and the term "education program or activity" is not defined. There is, however, some indication that Congress intended that term to have an expansive meaning. Section 901(a) of Title IX provides a series of exemptions from the general prohibition. Among them are exemptions for the Boy Scouts, the Girl Scouts, and social fraternities and sororities. We assume that absent the exemptions, each of these groups of organizations would be subject to the prohibition against sex discrimination as an education program or activity. In our view a definition of "education program or activity" that encompasses social fraternities and sororities also encompasses intercollegiate athletics, including revenue producing athletics as well.

The limited legislative history for Title IX tends to support a broad view of what is an education program or activity, but is less clear with respect to whether athletics, and particularly revenue producing intercollegiate athletics, are included in the term. In the only comments of any length on the subject, Senator Bayh, the Senate sponsor of Title IX, stated:

> What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated,

> nor that the men's locker room be desegregated. Cong. Rec. S 13554 (daily ed. August 6, 1971). 1/

However, any ambiguity as to whether revenue producing intercollegiate athletics are an education program or activity under Title IX was eliminated in 1974 by the enactment of section 844 of the Education Amendments of 1974. The language of that section and its history make it clear that it is Congress' intent that revenue producing intercollegiate athletics be included in the term.

On May 20, 1974 Senator John Tower of Texas introduced an amendment to Title IX exempting revenue producing athletics. It stated:

> [T]his section [§901 of Title IX] shall not apply to an intercollegiate athletic activity to the extent such activity does or may provide gross receipts or donations to the institution necessary to support that activity. Cong. Rec. S 8488 (daily ed. May 20, 1974).

The amendment was adopted on the floor of the Senate by voice vote. The Conference Committee on the Education Amendments of 1974 deleted Senator Tower's amendment. Instead the Conference adopted what was to become section 844 of the 1974 Amendments, commonly referred to as the "Javits Amendment." It provides as follows:

> The Secretary [of HEW] shall prepare and publish...proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in Federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of the particular sports. (Emphasis added.)

1/ Other comments in the debates refer, in passing, to the possible need to maintain separate physical education facilities, S 1769 (daily ed., Feb. 15, 1972), 92d Cong., 2d Sess., comments of Sen. Bayh; and S 2747 (daily ed., Feb. 28, 1972), 92d Cong., 2d Sess., comments of Sen. Bayh.

In our judgment, Congress has made it clear, by rejecting an exemption from Title IX for revenue producing athletics and adopting section 844, which requires the promulgation of Title IX regulations that include reasonable provisions concerning intercollegiate athletic activities, that revenue producing intercollegiate athletics are an "education program or activity" within the meaning of Title IX. 2/ An institution of higher education must, therefore, comply with the prohibition against sex discrimination imposed by Title IX in the administration of any revenue producing intercollegiate athletic activity if the activity is receiving Federal financial assistance, directly or indirectly.

There are some revenue producing intercollegiate athletic activities that clearly receive direct Federal financial assistance. Funds provided under Title VII of the Higher Education Act, for example, may be used to build facilities that are used, in part, for revenue producing athletics. While it is clear that assistance of this kind which directly supports an intercollegiate athletic program would subject the program to the requirements of Title IX and the implementing regulations, such direct assistance is not common. Other kinds of assistance that bear a less direct relationship to revenue producing intercollegiate athletics, particularly student financial assistance, are more common.

It is well established that general student financial assistance, such as guaranteed student loans and grants, provided by the Federal government to assist a student in paying the cost of attending an institution of higher education is Federal financial assistance to the institution. Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), aff'd sub nom., Bob Jones University v. Roudebush, 529 F. 2d 514(4th Cir. 1975). Historically, intercollegiate athletics have been described as an integral part of general undergraduate education. For example, the 1976-77 Manual of the National Collegiate Athletic Association, the private association that regulates

2/ The history of Congressional action on other proposals for amending Title IX with respect to intercollegiate athletics and on proposals for Congressional disapproval of the Department's regulations implementing that Title tend to further support this conclusion. A brief summary of that history is attached at Tab A.

much of the nation's intercollegiate athletics, contains the following statement of fundamental policy:

> The competitive athletic programs of the colleges are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and, by so doing, retain a clear line of demarcation between college athletics and professional sports. Manual, at 5.

In our view, therefore, student financial assistance is Federal financial assistance to the revenue producing athletic programs of the student's institution of higher education.

The inclusion of revenue-producing intercollegiate athletics within the education programs and activities receiving Federal financial assistance is not the only basis on which an institution of higher education is required to comply with Title IX in the administration of such programs. It is well settled, with respect to the prohibition against discrimination on the basis of race, religion, color or national origin imposed by Title VI of the Civil Rights Act of 1964, that Federal financial assistance may not be provided to any program or activity which is either administered in a discriminatory manner or "infected by a discriminatory environment." Board of Public Institution of Taylor County, Florida v. Finch, 414 F.2d 1068, 1073 (5th Cir. 1968).

Under this infection doctrine, a Federal grantee is required to comply with Title VI in the administration of an activity that does not receive Federal financial assistance if that activity is so closely related to, and such an integral part of, a program or activity that does receive Federal financial assistance that discrimination in the administration of the former would infect the latter.

The infection doctrine is as applicable to Title IX of the Education Amendments of 1972 as it is to Title VI of the Civil Rights Act of 1964. As indicated previously, historically intercollegiate athletics have been described as an integral part of general undergraduate education. In our view, revenue producing intercollegiate athletics are so integral to the general undergraduate education program of an institution of higher education that sex discrimination in the administration of a revenue producing athletic activity would necessarily infect the general undergraduate education program of the institution.

Therefore, in our opinion, an institution of higher education which is receiving Federal financial assistance for its general undergraduate education program must comply with the prohibitions against sex discrimination imposed by Title IX in the administration of its revenue producing intercollegiate athletic activities regardless of whether those athletic activities are themselves receiving Federal financial assistance.

The Secretary, in fulfilling his obligation to assure that institutions of higher education receiving Federal financial assistance comply with Title IX, is authorized to promulgate regulations and policies defining what constitutes discrimination prohibited by that title. In our opinion, the provisions of the current Title IX regulations and the Department's policies that deal specifically with athletics, including revenue producing intercollegiate athletics, are consistent with the statute and are a proper exercise of the Secretary's discretion. The text of the regulations, 45 C.F.R. 86.41, is attached at Tab B.

It should also be noted that in our view the current Title IX regulations and policies allow flexibility in their application to revenue producing intercollegiate athletics.